FILED
FEB 15 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1266

KENNEBEC LOG DRIVING COMPANY,
SCOTT PAPER COMPANY,
HUDSON PULP & PAPER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ROBERTS B. OWEN
WILLIAM D. IVERSON
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C.
Attorneys for Appellees

Of Counsel:
VINCENT L. McKUSICK
DANIEL E. BOXER
PIERCE, ATWOOD, SCRIBNER, ALLEN & McKUSICK
One Monument Square
Portland, Maine 04111

LOYALL F. SEWALL
VERRILL, DANA, PHILBRICK, PUTNAM & WILLIAMSON
57 Exchange Street
Portland, Maine

NORMAN M. HERRMAN
ELLIS A. HORWITZ
Scott Paper Company
Scott Plaza
Philadelphia, Pennsylvania 19113

TABLE OF CONTENTS

	Page
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
ISSUE PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	19

TABLE OF CITATIONS

CASES:

Boys Market v. *Retail Clerks Local 770*, 398 U.S. 235 (1970)	12
Clifford F. MacEvoy Co. v. *United States*, 322 U.S. 102 (1944)	13
Fourco Glass Co. v. *Transmirra Prods. Corp.*, 353 U.S. 222 (1953)	13
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971)	16
Johnson v. *United States*, 163 F. 30 (1st Cir. 1908)	13
Lewis v. *Martin*, 397 U.S. 552 (1970)	16
Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 (1956)	12
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969)	16
Richards v. *United States*, 369 U.S. 1 (1962)	12
Udall v. *Tallman*, 380 U.S. 1 (1965)	16
United States v. *City of Chicago*, 400 U.S. 8 (1970)	16
United States v. *Granite State Packing Co.*, 470 F.2d 303 (1st Cir. 1972)	14
United States v. *Hutcheson*, 312 U.S. 219 (1941)	13
United States v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973)	2, 14-16

STATUTORY PROVISIONS:

Rivers & Harbors Act of 1899
Section 10, 33 U.S.C. § 403 .....
Section 13, 33 U.S.C. § 407 .....
Section 15, 33 U.S.C. § 409 .....

Act of May 9, 1900, 33 U.S.C. § 410 .....

Federal Water Pollution Control Act Amendments
1972, 86 Stat. 816 .....

LEGISLATIVE MATERIALS:

33 Cong. Rec. 4870 (April 30, 1900) .....
Sen. Doc. No. 12, 49th Cong., 1st Sess. (1885) .....
Sen. Rep. No. 224, 50th Cong., 1st Sess. (1888) ....
H.R. Doc. No. 54, 45th Cong., 3d Sess. (1879) .....
H.R. Rep. No. 2760, 50th Cong., 1st Sess. (1888) ..
H.R. Rep. No. 477, 51st Cong., 1st Sess. (1890) ..
Annual Reports of the War Department, Report of
Chief of Engineers, H.R. Doc. No. 2, Vol. II, p
56th Cong., 1st Sess. (1900) .....

MISCELLANEOUS:

R. F. FRIES, EMPIRE IN PINE: THE STORY OF LUMBE
IN WISCONSIN 1830-1900 (1951) .....

LOG STORAGE & RAFTING IN PUBLIC WATERS: A T
FORCE REPORT APPROVED BY THE PACIFIC NO
WEST POLLUTION CONTROL COUNCIL (1971) ...

Page

passim
passim
. 3, 5-6
passim
of
.. 18

.. 6, 8
.. 12
.. 12
.. 12
.. 12
.. 12
he
1,
.. 17

NG
... 6
SK
TH-
... 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

KENNEBEC LOG DRIVING COMPANY,
SCOTT PAPER COMPANY,
HUDSON PULP & PAPER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in *United States of America* v. *Kennebec Log Driving Co., et al.*, entered November 30, 1973. That judgment vacated an order of the District Court for the District of Maine (per Gignoux, J.), which granted a summary judgment in favor of the petitioners on March 7, 1973, and dismissed the complaint filed by the respondent United States of America. At petitioners' request the Court of Appeals has stayed its mandate pending disposition of this petition for certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals has reported. It is printed as Appendix B. (Ap The opinion and order of the District Court i at 356 F. Supp. 344. It is printed as Ap (App. 1a-21a)

JURISDICTION

The judgment of the Court of Appeals w on November 30, 1973 and is printed as Aj (App. 1c) The Court of Appeals denied a t tion for rehearing filed by the responde States on December 19, 1973; that order is Appendix D. (App. 1d) The jurisdicti Court is invoked under 28 U.S.C. § 1254(1)

ISSUE PRESENTED

Since colonial days "river log driving" h established and important means of comme gation, and on certain types of rivers the a explicitly "legalized" by a 1900 federal st ject only to regulation by the Secretary of The Court of Appeals below, reversing t Court, has now interpreted an *earlier* en Congress—Section 13 of the Rivers and H of 1899—in such a way that it may be prevent the very activity which was aut Congress in 1900. The question presented the Court of Appeals' construction is cons established canons of statutory interpret due weight to long-standing administrati and accords with this Court's prior constru Rivers and Harbors Act of 1899 in *Unite Pennsylvania Indus. Chem. Corp.*, 411 U.S.

STATUTORY PROVISIONS INVOLVED

The provisions of Sections 10, 13 and 15 of th Rivers and Harbors Act of 1899, 33 U.S.C. §§ 403, 407 409, and of the Act of May 9, 1900, 33 U.S.C. § 410, ar set forth in relevant part in Appendix E. (App. 1e-3e

STATEMENT OF THE CASE

This case was initially decided upon cross-motion for summary judgment in the District Court. Th material facts were and are undisputed.

Petitioner Kennebec Log Driving Compan ("KLD") is a membership corporation which ha conducted an annual "log drive"—an operation de scribed in greater detail below—on the upper Kennebe River since 1835 under a special charter granted b the Legislature of the State of Maine. Because of th numerous shoals and dams on the upper Kennebe these log drives have been and are the principal, an indeed the only, form of commercial navigation o this portion of the river. For more than 70 yea KLD has conducted these log drives, without obje tion from any agency of the United States, in reliand upon a 1900 statute (cited immediately below) whic explicitly authorizes such log drives on rivers suc as the upper Kennebec.

By this petition KLD and its members[1] seek a authoritative determination by this Court whethe

[1] At the time the Complaint was filed in this action, the me bers of KLD were petitioners Scott Paper Company ("Scott" and Hudson Pulp and Paper Corporation. Although at one ti as many as 37 member companies placed logs in the river to driven by KLD, their numbers have dwindled over the years, a by the time this lawsuit was filed Scott was—and is today—t principal participant in the log drive.

Congress intended the specific provisions
of May 9, 1900, 33 U.S.C. § 410, to gover
on these rivers (as concluded by Judge G
whether it was the intent of Congress th
drives should, despite the specific authoriz
tion 410, remain subject to the general
against deposits of refuse contained in S
the 1899 Rivers and Harbors Act, 33 U.S.
concluded by the Court of Appeals).
which will be clarified below, the issue pr
is of vital importance to the entire log-driv
throughout the country.

Petitioners' Activities

It is undisputed, and both courts below
the Kennebec log drive is representative o
tional log drive" and that "the techniq
[in such log drives] have remained es
changed" for well over a century. (App
n.20; *see also* App. A at 2a-3a) Logs ar
the river bank and deposited in the water
current of the river is swift enough to ca
logs downstream, they are allowed to
"Booms," consisting of strings of log
gether by chains, are used to guide the lo
and other obstacles in order to keep them
channel. When the logs reach the he
formed by dams along the river, they ar
gathered together by other booms plac
river. As conditions permit, the logs are
"rafts" and towed across the lakes by
and then fed into sluiceways over the
the logs finally reach the mill for wh
destined, they are guided to the shore
removed from the river.

It is also undisputed—and indeed a necessary f
of nature—that "in the course of a drive a num
of logs inevitably become waterlogged and sink to
bottom", and "another acknowledged side effect of
log driving is the deposit . . . of quantities of b
which peel off the floating logs." (App. B at 3b (
omitted); *see also* App. A at 3a)

Statutory Framework

This case involves two statutes enacted by Cong
in successive years. The first is the Rivers and H
bors Act of 1899. It contains two general prohibiti
of potential applicability to log driving activities,
one provision which deals specifically with log driv

Section 10 of the 1899 Act, 33 U.S.C. § 403, p
hibits "the creation of any obstruction . . . to
navigable capacity of any of the waters of the Un
States," unless permission is obtained beforeh
from the Secretary of the Army upon the recomm
dation of the Chief of Engineers. (App. E at
Section 13 of the 1899 Act, 33 U.S.C. § 407—now c
monly referred to as the "Refuse Act"—prohibits
"deposit" of "any refuse matter of any kind or
scription whatever . . . into any navigable water of
United States," unless a permit is obtained from
Secretary before hand. (*Id.* at 1e-2e)

In addition to enacting these general prohibit
in Sections 10 and 13, Congress dealt specifically
log driving in Section 15 of the 1899 Act, 33 U.
§ 409. That provision states in relevant part that

> "It shall not be lawful . . . to float loose tin
> and logs, or to float what is known as 'sack r
> of timber and logs' in streams or channels

tually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation." (*Id.* at 2e)

Section 15 thus gave explicit priority to steamboat traffic wherever it conflicted with log driving—a lively problem on many rivers, particularly the Upper Mississippi, at the time.[2]

The following year, in 1900, Congress passed another statute dealing specifically with log driving. Acting in response to the protestations of log-driving interests that the prohibition contained in Section 15 of the 1899 Act was too sweeping, Congress passed the Act of May 9, 1900, 33 U.S.C. § 410. Section 410 provides in substance (1) that "the prohibition contained in [Section 15] . . . shall not apply to any navigable river . . . whereon the floating of loose timber and logs . . . is the principal method of navigation," subject only to the limitation (2) that "such method of navigation . . . shall be subject to the rules and regulations prescribed by the Secretary of the Army . . . ." (*Id.* at 3e)

Although the statutory language is clear, the legislative history of the 1900 Act is even more so. The report of the House members of the final conference committee states explicitly that the objective of the Act was to "exempt . . . the floating of logs and sack rafts [in the rivers involved] from the prohibitions included in the last river and harbor act," and that "it was agreed that the floating of logs, sack rafts, and timber should be allowed, under proper regulations, in [these] waterways . . . ." 33 *Cong. Rec.* 4870 (April 30, 1900).

---

[2] *See, e.g.*, R. F. Fries, Empire in Pine: The Story of Lumbering in Wisconsin 1830-1900 at 141-60 (1951).

Proceedings Below

The Justice Department filed this suit on March 19, 1971, seeking an injunction against further Kennebec log drives and remedial relief for alleged past violations of the 1899 Rivers and Harbors Act by KLD and its members. No such lawsuit had ever previously been filed in the 72-year history of the 1899 Act. The Government's novel theories were (1) that the Kennebec log drives violate Section 10 of the 1899 Act because the floating logs and the booms used to control their passage downstream obstruct the navigable capacity of the river, and (2) that the bits of bark which sometimes slough off floating logs and the logs which occasionally sink during the drives constitute illegal "deposits" of "refuse" under Section 13 of the Act.

The defendants-petitioners denied that their activities violated Sections 10 and 13. As a threshold issue KLD and its members pointed out that the Government's Complaint ignored the two statutory provisions which deal specifically with log driving, Section 15 of the 1899 Act and the 1900 statute now codified as 33 U.S.C. § 410. The defendants-petitioners contended that the statutory framework as a whole, particularly when read in light of its legislative history and subsequent administrative interpretations, shows that Congress specifically authorized log drives on rivers such as the upper Kennebec when it enacted Section 410 in 1900, and that in doing so Congress intended Section 410 to supersede whatever applicability Sections 10 and 13 of the 1899 Act might otherwise have to log drives on such rivers.

After extensive discovery was completed, the parties agreed that there was no genuine dispute as to any

material fact relating to the merits, and the case was submitted to the District Court on cross motions for summary judgment.

The District Court's Decision. The District Court agreed with the defendants-petitioners' analysis of the case. In awarding a summary judgment for defendants and dismissing the action, Judge Gignoux reasoned as follows:

(1) By enacting Section 410 in 1900, Congress "explicitly authorized log drives on rivers, such as the upper Kennebec, where log drives are the principal method of navigation, subject only to regulation by the . . . Secretary of the Army." (App. A at 12a) The court so concluded both from a reading of the statutory language (*id.*) and from its examination of Section 410's legislative history which states explicitly that log driving "should be allowed" on such rivers (*id.* at 16a, *quoting from* 33 *Cong. Rec.* 4870, April 30, 1900).

(2) Since there is abundant evidence of "Congress' contemporaneous knowledge of log driving methods" in 1900, Congress must have intended its authorization of log driving on such rivers to encompass the necessary incidents of log driving, including specifically the use of booms and the sloughing off of bark and the sinking of logs. (*Id.* at 13a-15a)

(3) The application of "established principles of statutory construction" (*id.* at 13a, citations omitted) compels the conclusion that Congress must have intended its *specific* authorization of log driving and its necessary incidents (Section 410) to supersede whatever applicability its earlier *general* prohibitions against obstructions to navigation and deposits of

refuse (Sections 10 and 13 of the 1899 Act) might otherwise have had to rivers primarily used for log driving (*id.*). Judge Gignoux found this conclusion compelling because any other construction of the statutory scheme would "attribute to Congress an intent to legalize log driving and at the same time prohibit its unavoidable side effects" (*id.* at 14a), and because "the Government offer[ed] no alternative theory of what Congress intended to accomplish by enacting Section 410, or how Section 410 could have any effect except by reducing the reach of Sections 10 and 13" (*id.* at 14a n.15).

(4) This reading of the statutory scheme is supported by more than 70 years of consistent administrative interpretations, under which (a) the Secretary of War (and later the Secretary of the Army) has issued numerous regulations under Section 410 to regulate log driving (*id.* at 17a-18a & nn.17-18), and (b) the Government has never before attempted to apply Sections 10 and 13 of the 1899 Act to log driving on a river principally used for such navigation, either by bringing suit or issuing permits (*id.* at 18a-20a).

(5) Under this interpretation of the statutory scheme, the Kennebec log drives are lawful under Section 410 since "the undisputed facts appearing in the record" (*id.* at 20a) show that "the Kennebec drive is typical" of "the traditional river drive," which has "remained largely unchanged" since Congress enacted Section 410 in 1900 (*id.* at 12a).

Because the District Court found Section 410 controlling, it did not find it necessary to reach the defendants-petitioners' contentions that the Kennebec

log drives would not violate Sections 10 and 13 even i those provisions were applicable. (*Id.* at 10a & nn. 11 12)

The Opinion of the Court of Appeals. Although i found Judge Gignoux's opinion "thoughtful and well documented" (App. B. at 10b) and agreed with it i part, the Court of Appeals disagreed with a portion o the lower court's analysis. First, the Court of Appeal held that the District Court was correct in holdin that Section 410's authorization of log driving on river principally used for such navigation superseded wha ever applicability Section 10 of the 1899 Act migh otherwise have to such activities. It reached this co clusion primarily because Section 10, on the one han specifically refers to "booms" as a possible obstru tion to navigation (*see* App. E at 1e-2e), while, on th other hand, "the use of booms in the navigation floating logs was recognized by reference to booms" i the legislative history of Section 410. (App. B at 13b Given this evidence that Congress focused upon th use of booms in both statutes, the Court of Appea concluded that in authorizing log drives on the rive covered by Section 410, Congress "must necessari have also meant to exempt logging booms from a restrictions contained in any other section." (*Id.* 14b)

But the Court of Appeals refused to agree with t District Court that Section 410 also superseded wha ever applicability Section 13's prohibition against d posits of refuse might otherwise have to log drives the rivers involved, because "there is not a word the legislative history, or in the 1900 Act, concerni the sinking of water-logged timber, the sloughing

bark, or the pollution caused by log driving."[3] (*Id.* at 12b)

In concluding that Section 410 did not affect the potential reach of Section 13 of the 1899 Act vis-a-vis log drives on logging rivers, the Court of Appeals was also influenced by its analysis of the role Section 13 was intended to play in protecting the nation's rivers. The court concluded that Section 13 "was envisaged [by Congress] as a means of *regulating* and bringing under scrutiny actions which might threaten the well-being of the nation's waterways." (*Id.* at 11b) (Emphasis added.) Since the court further concluded that the regulatory program allegedly contemplated by Section 13 "was intended by the Congress to prevent pollution, as well as obstruction, of navigable waterways" (*id.* at 12b), the appellate court reasoned that there was no logical inconsistency in holding that while Section 410 "legalized" log drives on rivers principally used for such navigation (*id.*), log drives on such rivers remain subject to the regulatory program allegedly contemplated by Section 13 of the 1899 Act.

In light of its conclusion that the District Court had erred in holding that Section 410 superseded whatever applicability Section 13 of the 1899 Act might have to log drives on rivers such as the upper Kennebec, the Court of Appeals vacated the judgment below and remanded the case for further proceedings not inconsistent with its opinion. Thereafter, at petitioners' request, the court stayed its mandate pending disposition of the instant petition.

---

[3] The quoted language is somewhat redundant. There is no contention in this case that log driving is responsible for "pollution" except to the extent that sunken logs and bits of bark may arguably be considered pollutants.

REASONS FOR GRANTING THE WRIT

I.

This Court has held many times that "statut interpretation requires more then concentration isolated words; rather, consideration must be given the total corpus of pertinent law and the policies t inspired ostensibly inconsistent provisions." *B Market* v. *Retail Clerks Local 770,* 398 U.S. 235, (1970); *accord, Richards* v. *United States,* 369 U.S 11 (1962); *Mastro Plastics Corp.* v. *NLRB,* 350 U 270, 285 (1956). The petitioners contend that Court of Appeals' conclusion that Section 410 had effect upon the reach of Section 13 of the 1899 vis-a-vis log drives was the product of just such improper "concentration on isolated words"—*e.g.,* happenstance that Congress did not refer specific to sunken logs or the sloughing off of bits of bark w it enacted Section 410. It is undisputed that ev log drive in history has involved the sinking of s logs and the sloughing off of occasional bits of barl is equally undisputed that Congress was thorou familiar with log driving as an important comme activity when it enacted Section 410 in 1900.[4]

It is an equally well-established principle, recogn by the District Court but overlooked by the Cou Appeals, that "however inclusive may be the ge language of a statute, it will not be held to apply matter specifically dealt with in another part of

[4] The defendants-petitioners demonstrated in the District that log driving was the subject of legislative attention on a nu of occasions during the years before 1900. *See, e.g.,* H.R. No. 54, 45th Cong., 3d Sess. 8-9, 11 (1879); Sen. Doc. No. 12 Cong., 1st Sess. 32, 36-37, 48-49, 72 (1885); H.R. Rep. No. 2 Sen. Rep. 224, 50th Cong., 1st Sess. (1888); H.R. Rep. No 51st Cong., 1st Sess. 2 (1890).

same enactment . . . . Specific terms prevail over the general in the same or another statute which might otherwise be controlling." *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957); *see also, e.g., Clifford F. MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944). In this case, Congress dealt with log driving specifically on two occasions, first in prohibiting log drives whenever they would conflict with other forms of navigation in Section 15 of the 1899 Act, and then in removing this prohibition as to log drives on rivers principally used for such navigation (subject to regulations to be issued by the Secretary) in Section 410. The legislative history of the 1900 Act, moreover, demonstrates a careful and detailed consideration by Congress of the circumstances under which log driving was and was not to be authorized. (*See* App. A at 14a-17a) The Congressional purpose is clear: log drives were to be authorized on rivers such as the upper Kennebec. It would make no sense to conclude that Section 410 did not accomplish that goal because Congress explicitly amended only Section 15 of the 1899 Act, without specific mention of Section 13. As Justice Holmes pointed out, while sitting on circuit, "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States*, 163 F. 30, 32 (1st Cir. 1908); *see also, e.g., United States* v. *Hutcheson*, 312 U.S. 219, 235 (1941) ("legislation must not be read in a spirit of mutilating narrowness").

In attempting to justify its approach of reading Section 13 and Section 410 in complete isolation from one another, the Court of Appeals also relied upon a conception of Section 13 fundamentally inconsistent

with past decisions of its own and of this Cou
this case, the Court of Appeals held that Sec
was not "envisaged" by Congress "as a comple
hibition on any activity," but rather "as a m
regulating and bringing under scrutiny action
might threaten . . . the nation's waterways."
B at 11b) But the latter *regulatory* concep
Section 13 contrasts sharply with the same cou
clusion, in its recent decision in *United S*
Granite State Packing Co., 470 F.2d 303 (
1972), that Section 13 is primarily *prohibi*
nature: "Basically, it forbids certain condu
exceptions [*i.e.*, permits, when granted]." *Id*

This Court cited *Granite State* favorably in
sion last term in *United States* v. *Pennsylvani*
Chem. Corp. [*PICCO*], 411 U.S. 655, 662-63
Indeed, in the latter case this Court emphasi
more forcefully the essentially prohibitory n
Section 13. In holding that the absence of "
regulatory-permit program," *id.* at 662, wa
defense to prosecution under Section 13, th
held:

> "Section 13 declares in simple absolutes
> '[i]t shall not be lawful' to discharge o
> into navigable waters of the United St
> refuse matter of any kind or descripti
> ever' except as permitted by the Secreta
> Army." *Id.* at 669.

The Court further noted that Section 13 "co
criteria to be followed by the Secretary in iss
permits," *id.* at 668, and makes the Secret
thority to issue permits wholly "discretionar
"nothing in the Section *requires* the establis
such a program as a condition to rendering
ative," *id.* at 662 (emphasis in original).

In short, as this Court has interpreted Section 13 (and as petitioners believe the Court of Appeals itself has previously interpreted that provision), Congress intended by its enactment to prohibit certain conduct, subject only to such wholly "discretionary" permits as the Secretary might issue in certain cases. And, according to this Court's decision in *PICCO,* if the Secretary were to make a discretionary determination not to make any permits available for a particular type of activity falling within the scope of Section 13, those who wished to engage in the activity would have no right whatever to do so.

If this is so, however, the Court of Appeals' interpretation of the interaction between Section 410 and Section 13 of the 1899 Act cannot be correct. The Court of Appeals acknowledged that Section 410 was intended to "legalize" log driving on rivers principally used for such navigation. In other words, even the Court of Appeals agreed that Section 410 was intended to give would-be log drivers an affirmative right to conduct their business on rivers within the scope of that provision. But under this Court's decision in *PICCO,* a person wishing to engage in an activity subject to Section 13 of the 1899 Act has no right whatever: unless the Secretary decides, on a discretionary basis, to issue permits, the activity is prohibited "in simple absolutes." Petitioners submit that it necessarily follows (a) that Section 13, being "prohibitory," is inapplicable to the traditional log drive on the rivers defined in Section 410 and (b) that the Court of Appeals' conclusion to the contrary is erroneous.

It should be emphasized that the distinction between a "regulatory" and a "prohibitory" statute is not merely a matter of semantics. If Congress intended

to "legalize" log driving (App. B at 12b clearly did—it could not have contemplated driving on the rivers involved would rema to the flat prohibition of Sectoin 13 of the Conversely, if Congress had really wanted a regulatory program of the sort that could to log driving without totally emasculatin 410—rather than opting for the prohibitory reflected in Section 13—it was quite capabl so, as this Court recognized in *PICCO*. *Se* at 655 and n.11 (citing the regulatory pro Section 11 of the 1899 Act, 33 U.S.C. § 404). that Congress did not follow that course evidence that, as this Court held in *PICCO* intended primarily to prohibit certain condu ing Section 13, and not to create a regulator

II

This Court has also held many times that struction of a statute by those charged with tion should be followed unless there are indications it is wrong." *Red Lion Broadc FCC*, 395 U.S. 367, 381 (1969); *accord, e.g. Duke Power Co.*, 401 U.S. 424, 433-34 (197 *States* v. *City of Chicago*, 400 U.S. 8, 10 (19 v. *Martin*, 397 U.S. 552, 559 (1970). Such a tive interpretations are entitled to particu when they reflect "a contemporaneous cons a statute by the men charged with the respo setting its machinery in motion. . . ." *Udall* 380 U.S. 1, 16 (1965).

In reaching its decision in this case, th Appeals paid no heed whatever to a patte sistent administrative interpretation of th framework which began contemporaneousl

enactment of Section 410 and which has continued to the present day. The administrative official responsible for implementing the new statute, the Secretary of War (now the Secretary of the Army), quickly and unambiguously interpreted the 1900 Act as superseding the 1899 Act insofar as log driving on the rivers involved was concerned. In his 1900 Annual report he stated

> "A larger number of rivers is included in the class *excepted from the law of 1899*, and different regulations based upon the varying conditions will be required for each river." *Annual Report of the War Department, Report of the Chief of Engineers*, H.R. Doc. No. 2, Vol. II, pt. 1, 56 Cong. 1st Sess. 44 (1900) (emphasis added).

Immediately thereafter the Secretary began issuing regulations to regulate log driving under the authority granted by Section 410, many of which are still in effect.[5] In contrast to the contemporaneous and consistent pattern of regulating log drives under Section 410, the Secretary has never issued any regulations or granted any permits relating to log driving under Section 13 of the 1899 Act.[6]

Because the Court of Appeals ignored these long-standing administrative interpretations, and accorded them no weight in analyzing the relationship between Section 410 and Section 13 of the 1899 Act, its opinion

---

[5] Citations to these regulations are set forth in the Opinion of the District Court. (*See* App. A at 17a-18a & nn.17, 18) It is undisputed that the Secretary has never issued regulations governing the Kennebec log drives, although he could do so, of course, if he believed that such regulation was necessary.

[6] *See id.*

is in conflict with the previous decisions of
cited above.

III

The question whether Section 410 supersc
13 of the 1899 Act as to log driving on rivers
used for such navigation is important not o
tioners but also for the numerous other
that conduct log driving or rafting opera
Court of Appeals decision would make eve
ing or rafting activity in the United State
vulnerable to prosecution under Section 13.
of Appeals explicitly recognized the far-r
portance of its decision:

> "Resolution of the issue presented i
> with its possibility of recurrence w
> driving is still carried on, presents u
> we consider to be an important quest
> which it is our duty to resolve." (Ap

As the Court of Appeals was evidently
are a substantial number of log driving
operations in various sections of the cou
log drives may be of lesser importance
Northeast than when Congress enacted Se
1900, the timber industry in other regions,
the Pacific Northwest, still depends heavil
transportation of logs. It has been es
example, that from 2.8 to 3 billion board f
cut in the Pacific Northwest were transpo

---

[7] In order to resolve the issue presented by this
involves only the interpretation of the relationship
410 and Section 13 of the 1899 Act—the Court need
effect, if any, the Federal Water Pollution Control A
of 1972, 86 Stat. 816, may have upon the operatio
of the 1899 Act.

in 1971.[8] For this reason petitioners respectfully
mit that the erroneous decision of the Court of A
is of sufficiently far-reaching importance to r
review and correction by this Court.

CONCLUSION

For the foregoing reasons, the petition for a w
certiorari should be granted.

Respectfully submitted,

ROBERTS B. OWEN
WILLIAM D. IVERSON
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C.
Attorneys for Appellees

Of Counsel:

VINCENT L. MCKUSICK
DANIEL E. BOXER
Pierce, Atwood, Scribner,
Allen & McKusick
One Monument Square
Portland, Maine 04111

LOYALL F. SEWALL
VERRILL, DANA, PHILBRICK, PUTNAM &
WILLIAMSON
59 Exchange Street
Portland, Maine

NORMAN M. HEISMAN
ELLIS A. HORWITZ
Scott Paper Company
Scott Plaza
Philadelphia, Pennsylvania 19113

---

[8] *See* LOG STORAGE & RAFTING IN PUBLIC WATERS: A TAS
REPORT APPROVED BY THE PACIFIC NORTHWEST POLLUTION
COUNCIL 1 (1971).